

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

In the Matter of )

Regulatory Treatment of LEC Provision )  
of Interexchange Services Originating )  
in the LEC's Local Exchange Area )

CC Docket No. 96-149

**DOCKET FILE COPY ORIGINAL**

and )

Policy and Rules Concerning the )  
Interstate, Interexchange Marketplace )

CC Docket No. 96-61

**JOINT REPLY OF RCN TELECOM SERVICES, INC.  
AND HYPERION TELECOMMUNICATIONS, INC.  
TO OPPOSITIONS TO  
PETITION FOR RECONSIDERATION AND CLARIFICATION**

RCN Telecom Services, Inc. ("RCN"), and Hyperion Telecommunications, Inc. ("Hyperion") (collectively, "Joint Petitioners"), by undersigned counsel and pursuant to Section 1.429 of the Federal Communications Commission's ("Commission") rules, respectfully reply to Oppositions filed to their petition to reconsider and clarify certain portions of the Commission's April 18, 1997 Report and Orders in the above-referenced dockets (collectively, "Order"). The Oppositions filed by a number of the Bell Operating Companies ("BOCs") and their industry representative, the United States Telephone Association ("USTA"), misapprehend the central point of the Petition filed by RCN and Hyperion. While the BOCs argue that RCN and Hyperion present no specific evidence that the interLATA affiliates will exercise market power in their individual in-region markets, their argument obscures the fact that neither this Commission nor any individual party -- BOC or competitor -- has performed a detailed analysis or presented any specific evidence of whether any particular interLATA affiliate will exercise market power in this fashion. As the Joint Petitioners

demonstrated in their Petition, a threat of an improper exercise of market power still exists, and the Commission should only treat a carrier as nondominant when it has been determined that *the particular carrier in question* cannot adversely affect competition in the market.

**I. THE BELL OPERATING COMPANIES FAIL TO ACCOUNT ADEQUATELY FOR THE EFFECT THAT AN IMPROPER EXERCISE OF MARKET POWER COULD HAVE ON SMALLER COMPETITORS.**

The Commission acknowledged in its *Order* that the exercise of market power by BOC interLATA affiliates could lead to smaller competitors being priced out of the market.<sup>1</sup> In petitioning for reconsideration, the Joint Petitioners suggested that the Commission should take into account the status of smaller competitors by assessing the ability of individual BOC interLATA affiliates to exercise market power on a regional basis.<sup>2</sup> USTA now counters, "It does not follow that a smaller interexchange carrier ("IXC") can withstand competitive pressure from AT&T, yet would be unable to withstand competitive pressure from a BOC interLATA affiliate possessing less interexchange market share itself."<sup>3</sup>

USTA's reasoning fails for several reasons. As a preliminary matter, USTA's statement contradicts the Commission's own declaration. The Commission in fact has already suggested only that BOC interLATA affiliates will be unable to drive "one or more of [the four major] national

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<sup>1</sup> *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Third Report and Order, FCC 97-142 (rel. Apr. 18, 1997), at ¶ 107 ("*Order*").

<sup>2</sup> Petition at 5.

<sup>3</sup> USTA at 5.

companies from the market,"<sup>4</sup> implying that smaller competitors will be at more significant risk of being driven from the market by an improper exercise of market power by a BOC interLATA affiliate. By contrast, competition has quite clearly flourished in the interexchange market over the past five years,<sup>5</sup> despite USTA's claim of dominance by "three IXC's moving in lock-step."<sup>6</sup> The Commission must address the unique impact of BOC interLATA affiliate entry by examining the market impact on a region-by-region basis.

USTA's argument is also flawed in that it attempts to compare the presence of BOC interLATA affiliates with the presence of AT&T and other large IXC's in the market.<sup>7</sup> Notwithstanding their combined market share, none of these carriers has possessed bottleneck control over an entire region's local exchange market since 1984, and the Commission has made a clear, detailed finding with respect to the specific ability of AT&T to improperly exercise market power in the interexchange market.<sup>8</sup> Conversely, each of the BOCs maintains a monopolistic market

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<sup>4</sup> Order at ¶ 107.

<sup>5</sup> As RCN and Hyperion reported in their Petition, the number of small IXC's and their revenues more than doubled between 1991 and 1996. Petition at 4, n.8 (citing *Report on Long Distance Market Shares* at 5, Table 2 (1997)).

<sup>6</sup> USTA at 8.

<sup>7</sup> See USTA at 5 and 7. See also SBC at 5.

<sup>8</sup> See *Motion of AT&T Corp. to be Reclassified as a Nondominant Carrier*, 11 FCC Rcd. 3271 (1995). While it is correct, as Bell Atlantic states, that the Commission did not make individualized findings in the *Competitive Carrier* proceeding, Bell Atlantic superficially glosses over the significant differences between the competitive IXC's in that proceeding and the BOC interLATA affiliates at issue here. *Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 2 F.C.C.2d 1, 23 (1980). In 1980, the competitive IXC's possessed little share and no control of bottleneck facilities in any market. By contrast, the interLATA carriers at issue in this proceeding are affiliated with carriers that continue to exercise monopoly control and possess an entrenched customer base in major markets. Thus,

share in the local market that could be used to leverage entry into the long distance market, and the Commission has not made a specific finding that any individual BOC interLATA affiliate would be unable to exercise market power to drive competitors from the market. The Joint Petitioners therefore renew their request that the Commission examine the specific effect that the entry of *each* affiliate will have on *all* competitors -- not just the largest IXC's -- in *each* in-region, interexchange market.

The Commission should also reject the mistaken claim by SBC Communications, Inc. ("SBC") that the competitive impact upon smaller IXC's is "irrelevant to the market power analysis that was properly carried out by the Commission."<sup>9</sup> SBC's conclusion is seemingly based upon the faulty premise that the Joint Petitioners are arguing that "BOC interLATA affiliates should not be afforded non-dominant regulatory treatment unless the BOC's can prove that no small competitors will go out of business." *Id.* Bell Atlantic likewise concludes, "[The Joint Petitioners] offer no support for their argument or offer explanation why any impact would not be a natural outgrowth of increased long distance competition."<sup>10</sup>

These BOC's blatantly mischaracterize the Joint Petitioners' point in order to avoid addressing it. Nowhere in the Joint Petition do RCN and Hyperion ask that the Commission protect every small competitor, nor do they urge the Commission to conclude that the failure of every small competitor is a result of an improper exercise of market power. Instead, the Joint Petitioners have

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there was little, if any, reason to believe that the competitive IXC's could act in an anticompetitive fashion if treated as nondominant carriers.

<sup>9</sup> SBC at 5.

<sup>10</sup> Bell Atlantic at 3, n. 7.

simply requested that the Commission consider and speak clearly to the impact on *all* competitors in making an assessment of market power. As was noted in the Petition and unaddressed in Oppositions, an oligopoly of four or five large carriers should not be considered the equivalent of effective competition.<sup>11</sup> All the Joint Petitioners seek -- contrary to SBC's and Bell Atlantic's claims -- is some assurance that if companies are going to compete in the interexchange market, they do so on the merits of their service offerings, and not on the basis of an entrenched customer base in the local market and the ability to act in an anticompetitive fashion. Until the Commission is prepared to declare that this is the case with respect to *all* competitors in a particular in-region market, it should not treat the BOC interLATA affiliate in question as nondominant.

## **II. THE COMMISSION SHOULD REJECT THE BELL OPERATING COMPANIES' EFFORT TO AVOID THE BURDEN OF PROOF.**

The BOCs argue that their interLATA affiliates should not bear the burden of demonstrating that they do not possess market power in a region. Bell Atlantic states, "[R]ather than an individualized fact finding, petitioners would have the Commission pre-judge the issue and 'place the burden of proof on the BOC interLATA affiliate to demonstrate that it does not possess market power in that region.'"<sup>12</sup> Bell Atlantic quite obviously misunderstands the Joint Petitioners' position, characterizing the placement of the burden of proof on BOC interLATA affiliates and an individualized fact finding as alternative propositions. The Joint Petitioners contend that a proper placement of the burden of proof and individualized fact findings are both essential in ensuring that each BOC interLATA affiliate cannot act in an anticompetitive fashion in its home region.

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<sup>11</sup> Petition at 5.

<sup>12</sup> Bell Atlantic at 4.

More importantly, placing the burden of proof on the BOC interLATA affiliate does not in any manner "pre-judge" the issue, as Bell Atlantic claims. As RCN and Hyperion noted in their Petition, this Commission has previously placed the burden of proof upon incumbent local exchange carriers when it has had a concern about their exercise of market power and the impact upon other carriers.<sup>13</sup> The Commission's decision in the *Local Competition* proceeding was not a case of "pre-judging," nor should a similar strategy be considered "pre-judging" in this instance. Quite simply, there are few facts upon which to make a judgment at this point. Accordingly, the Joint Petitioners ask the Commission to proceed cautiously until the specific facts are clear with respect to each BOC interLATA affiliate. Where competitors could be affected adversely by an exercise of market power, the Commission can and should proceed cautiously, letting the carrier in question into the market on terms that make it impossible for an exercise of market power to occur. Once the Commission has determined that the carrier cannot exercise market power in an anticompetitive fashion -- once it has been determined that *all* carriers, large and small, will succeed or fail on the merits of their service offerings -- then it becomes appropriate to declare the carrier nondominant.

Placing the burden of proof instead on competitors via the expedited complaint process and antitrust enforcement will not adequately address the exercise of market power by a BOC interLATA affiliate.<sup>14</sup> Although SBC, Bell Atlantic, and USTA argue that the *ex post* remedies are sufficient and timely,<sup>15</sup> they gracefully underestimate their own ability, and that of other BOCs, to extend

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<sup>13</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15965-66, at ¶¶ 936-939.

<sup>14</sup> See *Order* at ¶¶ 118, 128.

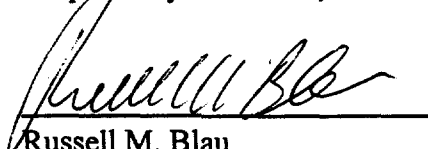
<sup>15</sup> USTA at 8; SBC at 6; Bell Atlantic at 4.

resolution far beyond an expedited complaint process. The Commission has admitted that competitive safeguards "are effective only to the extent that they are enforced."<sup>16</sup> With significant in-house legal staffs and regulatory budgets many times larger than that of all but the largest competitors, the BOCs can outlast many of those carriers who would otherwise prosecute claims to full resolution. Treating BOC interLATA affiliates as dominant carriers until they prove otherwise is therefore the only effective means by which the Commission can ensure that the existing competitive balance in the interexchange marketplace will not be irreparably damaged.

### III. CONCLUSION

For the foregoing reasons, the Joint Petitioners respectfully renew their request that the Commission reconsider its determination that BOC interLATA affiliates will be treated as non-dominant carriers in the provision of in-region, interexchange services.

Respectfully submitted,



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Dated: September 18, 1997

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<sup>16</sup> Order at ¶ 117.

## **CERTIFICATE OF SERVICE**

I, Margaret Mackey, hereby certify that a copy of the foregoing **Joint Reply of RCN Telecom Services, Inc. and Hyperion Telecommunications, Inc. to Oppositions to Petition for Reconsideration and Clarification** was sent to each of the following parties by first class mail on this 18th day of September, 1997.

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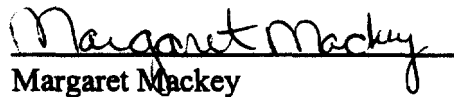
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